INDEX

	Page
Statement	1
Argument	6
Conclusion	10

CITATIONS

Cases:

Fashion Originators' Guild v. *Federal Trade Commission*, 312 U. S. 457 ..... 5, 7

Montague & Co. v. *Lowry*, 193 U. S. 38 7

Paul v. *Virginia*, 8 Wall. 168 6

Times-Picayune Publishing Co. v. *United States*, 345 U. S. 594 7

United States v. *South-Eastern Underwriters Assn.*, 322 U. S. 533 6

Statute:

McCarran-Ferguson Act, 59 Stat. 34, as amended, 15 U. S. C. 1012, *et seq.*:

Sec. 2 (*b*) 8

Sec. 3 (a) 8

Sec. 3 (b) 8

Sherman Act, C. 647, 26 Stat. 209, as amended:

Section 1 ..... 5, 6

Section 2 6

Miscellaneous:

91 Cong. Rec. 479, 481, 1443 9

H. Rep. No. 213, 79th Cong., 1st Sess. 9

S. Rep. No. 20, 79th Cong., 1st Sess 9

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 399

NEW ORLEANS INSURANCE EXCHANGE, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF LOUISIANA

MOTION TO AFFIRM

Pursuant to Rule 16, Paragraph 1 (c), of the Revised Rules of this Court, appellee moves that the judgment of the district court be affirmed on the ground that the questions upon which decision of the cause depends are so unsubstantial as not to require further argument.

STATEMENT

This is a direct appeal from the final judgment entered by the district court on March 19, 1957 (J. St. 46), adjudging that appellant had combined and conspired with its members and others to restrain and to monopolize, and had attempted to monopolize, interstate commerce in fire, casualty, and surety insurance, in violation of Sections 1 and 2 of the Sherman Act. The complaint was filed in January 1954,

and appellant's motion to dismiss was denied in November 1954 (*id.*, pp. 30–31). After trial, the court filed an opinion holding that the United States was entitled to a decree (*id.*, 13–24), and also filed separate findings of fact and conclusions of law (*id.*, 33–45).

The major pertinent facts, as set forth in the district court's findings of fact, are as follows:

Appellant is an association composed of about 130 agent members engaged in selling fire, casualty, and surety insurance in the New Orleans area, i. e., the Parishes of Orleans, Jefferson, and St. Bernard, Louisiana (fngs. 1–2). Its agent members represent 220 stock fire, casualty, and surety insurance companies, which include 90% of all companies of this character having assets in excess of $50,000,000 (fngs. 2, 9). During the period 1951 through 1954, the member agents wrote 65.1% of all multiple lines of insurance written by fire and casualty companies in the New Orleans area, 81.3% of the fire insurance written in that area, 67.4% of the casualty insurance (excluding accident and health) written in that area, and 98.1% of the surety business written in the area (fng. 9). The premiums on the business annually written by members range from approximately $25,000,000 to $30,000,000 (*ibid.*).

In the New Orleans area, "virtually all" stock fire, casualty, and surety insurance companies sell through agents rather than branch offices (fng. 4). The agents control to a great extent the placing of such insurance (fng. 7). The policyholder places business with the agent and the choice of companies is gener-

ally left to him, and personal contact with the policyholder is confined to the agent (*ibid.*). A company's success is thus directly related to its opportunity to secure representation by reliable, skillful agents having large, established clienteles (*ibid.*).

The Exchange's bylaws, to which all members must adhere, are rigidly enforced and policed (fngs. 20–23). Under the bylaws, members of the Exchange agree to boycott—not to represent—companies which appoint agents who are not members of the Exchange for the sale in the New Orleans area of fire, casualty or surety insurance, nonstock insurance companies, and companies which solicit insurance directly from the policyholder (fngs. 13, 15–16). The members agree to accept business from a nonmember agent or a nonstock company only if the facilities of all Exchange members have been exhausted and an affidavit to that effect has been filed with the Secretary of the Exchange; and they agree that no commission shall be paid on such business and that 10% of the net premiums involved shall be paid to the Exchange (fng. 14).

As a result of the Exchange's boycott, insurance companies operating in the New Orleans area have been denied a free choice in the selection of agents (fng. 35). Every company electing to place insurance through an Exchange member has been prevented from being represented by any nonmember agent and from selling insurance directly to the public through its salaried representatives (fngs. 26, 38–39). All insurance companies represented by nonmember agents in the New Orleans area, all nonstock com-

panies, and all companies which solicit insurance directly from the public have been prevented from obtaining representation by Exchange members and have been denied access to a substantial part of the market for fire, casualty, and surety insurance (fngs. 36–37). The Exchange and its members have "controlled and adversely affected the business operating policies" of fire and casualty insurance companies, not only in their choice of agents but also in "various other vital phases of their operations" (fng. 40).

The boycott has likewise "hampered" nonmember agents and caused them "substantial financial loss" (fng. 30). They are unable to represent any of the 220 stock companies represented by member agents, and these companies offer the only available facilities for writing certain risks in the fire, casualty and surety field (fng. 29).

The "great majority" of fire and casualty companies doing business in the New Orleans area maintain their home offices outside of the State of Louisiana. There is a steady flow of supplies, including policy forms, from the home offices to the local agents. The latter make regular reports and mail premiums to the out-of-state offices. They, in turn, remit to the agents checks in payment of claims. The result is a "continuous flow of business transactions" across state lines. (Fng. 8.)

In its opinion the court stated that the evidence established that the effect of the boycott in which the appellant Exchange and its members are engaged was that practically all the major stock companies sell exclusively through Exchange members although some of

the same companies sell in other areas through agents representing all types of insurance companies, including mutuals, and some sell in other areas directly to the public (J. St. 16). The practices, the court said, "are essentially the same, in purpose and effect, as those denounced as violative of the Sherman Act in" *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U. S. 457 (*id.*, 19). The court also noted that this Court has explicitly stated that restraints imposed by group boycotts are unreasonable *per se* and thus illegal under Section 1 of the Sherman Act (*id.*, 17–18). But the court found it unnecessary to decide the present case "on a per se basis", because the restraints which were imposed "not only tended to but actually did impose unreasonable restraints on interstate commerce" (*id.*, 18–19). Summarizing appellant's combination and conspiracy, the court said (*id.*, 21):

> The result, therefore, is that not only are the mutuals and other companies operating outside the Exchange excluded from a substantial market [approximately 75 per cent of the concerned insurance purchased in the New Orleans area] by a group boycott effected through the use of the dominant position of the Exchange, but companies allowed to do business through the Exchange outlets are actually controlled in their method of doing business in that, in addition to being denied the right to deal directly with the public, they must participate in the Exchange boycott of nonmember agencies. Not only are nonmember agencies restricted in their operations by a group boycott effected through the use of the dominant position of the Exchange,

but the member agencies themselves are prisoners, sometimes unwilling prisoners, of their own rules, for they, too, are limited in their operations under pain of expulsion and boycott.

ARGUMENT

The jurisdictional statement sets forth (J. St. 4–7) eleven questions which it states are presented by the appeal, but it does not show or attempt to show error in the decision of any of these questions. . . .

The questions raised as to whether appellant's conduct violated the Sherman Act are, we submit, wholly without substance. The first of these questions, labeled A, is whether appellant's activities are "beyond the scope of the Sherman Act" in view of the holding in *Paul* v. *Virginia,* 8 Wall. 168, that "insurance is not interstate commerce". This question is set at rest by *United States* v. *South-Eastern Underwriters Assn.,* 322 U. S. 533, which held that the business of insurance, when carried on in substantial volume across state boundaries, is interstate commerce and subject to the Sherman Act.

Question E, whether Sections 1 and 2 of the Sherman Act prohibit combinations and conspiracies to restrain or monopolize trade and commerce and attempts to monopolize, rather than "boycott, coercion, or intimidation" as such, is not, on the facts here, presented in this case. The district court expressly bottomed its decision on agreement to boycott and group boycotting. It said (J. St. 21–22): "It must be remembered that in suit here is a group boycott, participation in which was required of every Exchange member by its bylaws. While an individual agency may

have the right to boycott another agency or an insurance company, a concerted refusal to deal brings the combination within the condemnation of the Sherman Act."

Questions F and J, whether there was a showing that appellant's activities affected third parties or affected "substantial" interstate commerce, are disposed of by the following from the opinion below (J. St. 18–19):

> In fact, this defendant, through the dominant position of its membership, sits astride the stream of interstate commerce in insurance in the New Orleans area and directs its flow. It allows the large stock companies access to its outlets on condition that those companies participate in its group boycott of nonmember agencies. It refuses to allow any part of the 75 per cent of the insurance which it controls to move in the direction of mutuals or direct writers, and it relegates the numerically superior nonmember agencies to the discriminatory position of scrambling for the remaining 25% of the business while excluding them from placing it with the major stock companies controlled by the Exchange.

Question K, whether appellant's activities are reasonable within the so-called "rule of reason", simply raises the question whether this Court should repudiate a consistent line of decisions running from *Montague & Co.* v. *Lowry,* 193 U. S. 38, 45, to *Times-Picayune Publishing Co.* v. *United States,* 345 U. S. 594, 625, including the *Fashion Originators' Guild* case and cases there cited (312 U. S. at 465–466).

We submit that questions B, C, and D, which relate to the application of the McCarran-Ferguson Act, are likewise without merit. Section 3 (b) of that Act provides: "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." The substance of the questions raised is whether enactment by the State of Louisiana of legislation regulating insurance companies as to such conduct makes the Sherman Act *inapplicable* to boycotting agreements and boycotts, notwithstanding the express and unambiguous declaration of Section 3 (b) of the McCarran-Ferguson Act that nothing contained in that Act shall have such effect. The very purpose of the section was to exclude boycotting agreements, etc., from the limitations respectively imposed by Sections 3 (a) and 2 (b) of the Act, namely, that until June 30, 1948, the Sherman Act shall not apply to the business of insurance, and that after that date the Sherman Act shall be applicable to this business "to the extent that such business is not regulated by State law".

As the district court said, "[t]he legislative history of Section 3 (b) affirms what its language plainly says" (J. St. 24). Section 3 (b) of the original bill provided that nothing contained "in this section" shall make the Sherman Act inapplicable to boycotts, etc. Senator Murdock suggested that the word "Act" be substituted for "section" so that "we would not be limited merely to that one section", and Senator Ferguson consented to this change "because I am of the opinion that that was the intention of all concerned"

(91 Cong. Rec. 479; see *id.* at 481). The change was made in conference (H. Rep. 213, 79th Cong., 1st Sess., p. 2), and in that form was passed by both Houses.[1]

The Senate Judiciary Committee report on the bill declared that although Section 3 (a) temporarily suspended the Sherman Act to enable the States to consider legislation during the period of suspension, under Section 3 (b) the Sherman Act prohibitions against boycotts, etc., are "at no time" suspended and "remain in full force and effect" (S. Rep. 20, 79th Cong. 1st Sess., pp. 2–3). The Conference Committee emphasized that such acts remain "subject to the operation of the suspended statutes" even during the moratorium period provided in Section 3 (a) (H. Rep. 213, 79th Cong. 1st Sess., p. 3). Senator Ferguson, co-sponsor of the bill and also a Senate manager, asserted that no "State could pass a law permitting an agreement or an act of boycott, coercion, or intimidation" (91 Cong. Rec. 479, 1443).

The remaining questions presented, G, H, and I, scarcely deserve notice. G and I raise issues as to evidentiary or procedural rulings calling for exercise of the trial court's discretion, and appellant neither shows, nor under the facts could it show, any abuse of discretion. Question H is whether the judgment enjoins activities neither occurring nor threatened when the complaint was filed or subsequently. The case, however, presents no such issue. The district court ruled that "there can be no injunction issued to restrain a past activity which is no longer extant unless

[1] As the section appears in the United States Code (15 U. S. C. 1013 (b)), the word "chapter" is used instead of "Act".

there is immediate proof that the past activity again will be resorted to" (Tr. 18–19).

CONCLUSION

The decision below is correct, and this appeal presents no substantial question. It is therefore respectfully submitted that the judgment of the district court should be affirmed.

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